

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3
4 UNITED STATES OF AMERICA,) CASE NO. 17-CR-648 (FAB)
5 Plaintiff,)
6)
7 vs.) SENTENCING HEARING
8)
9 [1] ANGEL DE LA CRUZ,)
10 Defendant.)
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 TRANSCRIPT OF SENTENCING HEARING
 HELD BEFORE THE HONORABLE JUDGE FRANCISCO A. BESOSA
 SAN JUAN, PUERTO RICO
 Thursday, July 12, 2018

APPEARANCES:

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transcription

Joe Reynosa, CSR, RPR
Official Court Reporter

(PROCEEDINGS COMMENCED AT 10:20 A.M.)

THE CLERK: Criminal Case No. 17-648, United States of America versus Angel De La Cruz for Sentencing Hearing.

On behalf of the Government, Assistant United States Attorney David Thomas Henek.

On behalf of the Defendant, Assistant Federal Public Defender Yasmin A. Irizarry.

Defendant is present and assisted by the certified court interpreter.

MR. HENEK: Good morning, Your Honor. David Henek on behalf of the Government. The Government is ready to proceed.

MS. IRIZARRY: Good morning, Your Honor. Yasmin Irizarry on behalf of Mr. De La Cruz. And we are ready to proceed as well.

THE COURT: Ms. Irizarry, is there anything you would like to say on behalf of Mr. De La Cruz? And I have read your sentencing memorandum, which also includes objections to the pre-sentence investigation report.

MS. IRIZARRY: Yes, Your Honor.

As the Court then is aware, I have two objections to the pre-sentence investigation report, and I also have one request for a variance.

Before the Court probably indicates, I was able to

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1 discuss with the Government, and we both agree that my client
2 is eligible for a reduction pursuant to 2D1.1(b)(17). So we
3 both agree that he is eligible for that two level reduction.

4 Your Honor, obviously, we do not waive the
5 arguments that were represented by way of motion and that
6 were moved by the Court in docket 56 as to if the Court is
7 able to go under the 10-year mandatory minimum. So we make
8 those arguments part of the record. We won't go into them.

9 Once again --

10 THE COURT: No, I understand.

11 What you are saying is that you are objecting to
12 the fact that I decided that in this type of case, which is
13 filed under Title 46, the safety valve is not applicable, but
14 that the Defendant may qualify for a two level reduction
15 under 2D1.1(b)(17). So that's the situation, except that the
16 important thing about that is that, under the safety valve, I
17 am allowed to sentence a defendant below the statutory
18 minimum. Under 2D1.1(b)(17), I am not allowed to sentence a
19 defendant below the statutory minimum. That's the
20 difference.

21 So you retain that objection. I mean, it's on the
22 record, anyway.

23 MS. IRIZARRY: Understood, Your Honor.

24 Then my second objection to the PSR would be,
25 Your Honor, that we understand that my client's participation

1 in the instant offense --

2 THE COURT: Well, let me ask, Mr. Henek.

3 You have no problem that Mr. De La Cruz qualifies
4 under 2D1.1(b)(17)?

5 MR. HENEK: Correct, Your Honor. We would agree to
6 a two point reduction. So the PSR should -- the parties have
7 agreed that the PSR, the total offense level would be a level
8 33 instead of a level 35.

9 THE COURT: Thank you.

10 Your next objection, please.

11 MS. IRIZARRY: Yes, Your Honor.

12 We understand that his participation merits the two
13 level reduction under 3B1.2(b) for minor roll, which also
14 carries a four level additional adjustment under 2D1.1(a)(5),
15 Your Honor. So we would like to argue as to that.

16 Your Honor, as the Court is aware, we have the
17 burden to establish to the Court, by preponderance of the
18 evidence, that he is eligible or entitled to that minor role
19 adjustment. And the Court must make an individual assessment
20 as to if in this particular case the Court understands that
21 he is eligible for said adjustment.

22 For purposes of arguing that adjustment, we refer
23 to our sentencing memorandum at docket 89, page 3, third
24 paragraph, and page 4.

25 THE COURT: You even made the calculation in your

1 sentencing memorandum.

2 MS. IRIZARRY: Right now, yes. What I am talking
3 about the arguments in favor --

4 THE COURT: I read it. But you made the
5 calculation on page 5.

6 MS. IRIZARRY: Yes, Your Honor.

7 THE COURT: That considering what you request, the
8 total offense level would be 27 and that the guideline range
9 would be 70 to 87 months, if I were to accept the minor role
10 deduction and the -- the two minor role deductions. Although
11 you -- well, it's not a safely valve, the 2D1.1(b)(17), which
12 the Government agrees to.

13 MS. IRIZARRY: Yes, Your Honor.

14 THE COURT: Plus the three levels for acceptance of
15 responsibility.

16 MS. IRIZARRY: And the two pages prior to that
17 table that the Court is referencing to, basically, what I did
18 in the sentencing memorandum is that I mirrored the list of
19 factors that are mentioned in Application Notes 3(A) and (C)
20 of 3B1.2. Basically, Your Honor, we understand that our
21 client is a drug courier or a drug mule, which, considering
22 his particular circumstances, the Court should grant the two
23 level minor participant.

24 Your Honor, in this particular case, he was hired
25 to transport some controlled substances. He was not in

1 charge of the vessel, of the trip, and much less played any
2 role in the planning of the trip. There is a captain, which
3 the Court has already sentenced to ten years of imprisonment.
4 There is a first mate, which the Court has already sentenced
5 to a 10-year imprisonment term.

6 THE COURT: I don't think there was any evidence of
7 who was a captain and who was a first mate. I don't think in
8 this case there was any evidence as to that, whether one of
9 the three individuals was the captain or one was the first
10 mate, or whether all three can be considered as captains
11 because they took turns in steering the vessel. I don't
12 think there was any evidence as to that.

13 So I didn't take into consideration in sentencing
14 any of the others that anybody was a captain.

15 MS. IRIZARRY: Your Honor, I'm proffering to the
16 Court that that was the rules that is consistent, I believe,
17 with the information that the Government received through the
18 three interviews of the three Defendants. So I am proffering
19 to the Court that my client's role was neither the captain,
20 nor the first mate. That he was basically just the muscle or
21 the help. And in relation to the other two, his role was
22 less.

23 Your Honor, he was going to be paid one shot for
24 doing this trip. He had no propriety interest in the
25 criminal activity. He just was hired to do a certain task.

1 His participation was very limited in nature and in
2 extent. He was approached a couple days before leaving, and
3 he was offered to be paid a certain amount of money for
4 participating in the venture.

5 He had no discretion as to the fact -- the acts
6 that he was ordered to do in the venture. He was not part of
7 the inner circle in organizing any part, neither before,
8 after, nor during the trip.

9 What he did was neither essential, nor dispensable.
10 In fact, what he did could have been done by anyone.

11 We understand, as argued in the sentencing
12 memorandum, that if we consider what he did in this case, in
13 particular, in making assessment as to this case and his
14 acts, that it merits the two level decrease for acceptance
15 of -- sorry -- for minor role, plus the four level one that's
16 included in the 2D1.1 guideline, Your Honor.

17 In contrast, I argue, Your Honor, this Court just
18 sentenced a gentleman by the name of Harry Oyola-Lebron.
19 That man was charged in a multi-defendant, multi-kilo
20 conspiracy; whereas, the Court noted for the record, there
21 were firearms, and those firearms were used to kill people.
22 It was charged as a minimum -- mandatory minimum 10-year drug
23 conspiracy; 10 to life.

24 Mr. Oyola-Lebron was allowed to plead guilty to
25 less amount of drugs, hence 3.5 to 5 kilograms. So that

1 triggered the 5- to 40-year mandatory minimum, rather than
2 the 10 year to life.

3 As the Court stated, in that case he had a
4 leadership enhancement, he had a weapon enhancement, he had
5 prior acts committed in the '90s that were violent priors
6 with weapons. He had several arrests for different offenses,
7 which did not result in any conviction. And in the
8 particular case that the Court was sentencing him, he pled
9 guilty to an agreement, which gave him the leadership role
10 and also the firearm enhancement. That man was sentenced to
11 108 months of imprisonment.

12 Your Honor, in contrast, what we have here today is
13 a first-time Defendant of 27 years old with no history
14 whatsoever of controlled substance abuse. He was raised in a
15 stable household, very poor, and he has a stable family
16 because he has been -- in the only relationship he has been
17 in his life, which is with his wife, his wife of four years,
18 common-law wife of eight years. They have two children, two
19 small children.

20 My client's economic situation, which led to the
21 participation of this offense, is that his mother, who was a
22 pillar of society, who pushed him to enroll in college -- he
23 finished his high school education. He was enrolled in
24 college. He was working part-time. Fatima, his wife, was
25 working part-time; she died.

1 When she died, she left behind his two siblings,
2 sisters, who were minors at that time, and his oldest brother
3 who suffers from polio. And all of them depended on his
4 mother, who was also an artist and in sales in the artisan
5 trade, Your Honor.

6 He had to abandon his studies so that he could
7 support his family. His roof was falling in. He didn't have
8 a medical plan for his siblings. His wife had a condition
9 which required surgery. He didn't have a vehicle to
10 transport his family. And that's when he was approached with
11 the participation in the instant offense.

12 Everybody knows who his mother was. Everybody
13 knows that this honest family was -- what they were
14 suffering, and somebody took advantage and offered him a way
15 out.

16 He had been three years trying to support this
17 family, this extended family, but not being able to. And
18 that's why he participated in the instant offense.

19 Your Honor, in contrast, there is no way that it
20 could be reasonable for this man to receive a 120-month
21 sentence or 135, which is the lower end of the applicable
22 guideline range, when you have by contrast this other person
23 who has just been sentenced to 108 months, Your Honor.

24 This is --

25 THE COURT: But that person was sentenced under

1 different statutes.

2 MS. IRIZARRY: Exactly, Your Honor.

3 THE COURT: So you can't compare apples and
4 oranges.

5 MS. IRIZARRY: Nevertheless, we can compare as to
6 roles, Your Honor. We can compare as to mitigating factors,
7 Your Honor, for this Court to consider a variant sentence.

8 We know the Court's ruling, that the Court believes
9 that you cannot go under the 120 months.

10 Obviously, our request is 70 months, but we respect
11 the Court's ruling. But in no way can it be reasonable for
12 this person to receive a sentence of above 120 months,
13 Your Honor.

14 Also, we would like the Court --

15 THE COURT: Okay. So that's your request? Your
16 request is 120 months.

17 MS. IRIZARRY: No. My request is 70 months,
18 Your Honor. But we respect -- we know how the Court feels as
19 to that it cannot go under the 120 months.

20 THE COURT: Okay.

21 MS. IRIZARRY: Your Honor, we also ask for the
22 Court to rule on our -- on the facts of this particular case
23 in relation to the minor role that we are requesting.

24 THE COURT: Thank you.

25 Mr. Henek, what is your position on the minor role?

1 MR. HENEK: Good morning, Your Honor.

2 Your Honor, the Government opposes any application
3 of minor role, and on this basis, Your Honor:

4 The facts are very simple in this case. The
5 Defendant was -- Mr. De La Cruz was found on a boat with two
6 other individuals transporting over 1,300 kilograms of
7 cocaine, Your Honor. That is approximately \$26 million of
8 cocaine at current prices in Puerto Rico.

9 The Defendant has failed to meet their burden of
10 proving any minor role reduction. The First Circuit has held
11 on numerous occasions that the role of a courier does not
12 automatically entitle one to a reduction.

13 Similarly, Defense Counsel's arguing or trying to
14 argue that Mr. De La Cruz performed some type of menial task.
15 Again, the First Circuit has denied a minor role adjustment
16 where the Defendant has performed only menial tasks, such as
17 unloading drugs and conducting surveillance.

18 For the record, that's *United States v.*
19 *Ortiz-Santiago* 211 F.3d 146.

20 In addition, Your Honor, one particular case is
21 instructive with respect to minor role adjustment in boats
22 and narcotics trafficking. That's *U.S. v. Perez* 819 F.3d
23 541.

24 In that case, the First Circuit upheld the District
25 Court's denial of a minor role application where two

1 defendants were found onboard of a vessel with approximately
2 a thousand kilos of cocaine. Here we have more than that.
3 We have 1,325 kilos.

4 Finally, Your Honor, with respect to the minor role
5 reduction, quantity is relevant in determining whether or not
6 a minor role application is warranted. And on numerous
7 occasions, Courts have held that a far -- a substantially
8 less amount, in fact, under 100 kilograms of cocaine, does
9 not qualify for minor role. So I will just cite one or two
10 cases.

11 In the First Circuit, *U.S. v. Vargas* 560 F.3d 45,
12 there the denial of a mitigating role adjustment was affirmed
13 when the amount was only 30 kilograms of cocaine.

14 And I will cite a Ninth Circuit case, *U.S. v.*
15 *Rodriguez-Castro* 641 F.3d 1189. That, a denial of a
16 mitigating role was denied in a case only involving
17 33.46 kilograms of cocaine, which the Court considered was a
18 substantial amount. Therefore, denying the mitigation role.

19 So, on the facts of this case, Your Honor, we would
20 disagree with any application of a minor role based on
21 quantity, as well as the role that this -- Mr. De La Cruz was
22 one of three people actively transporting 1,300 kilos of
23 cocaine towards Puerto Rico.

24 Accordingly, we also agree with the Court's
25 determination that the safety valve does not apply in this

1 case. Therefore, with a total offense level of 33, the
2 United States would request a sentence at the lower end of
3 the guideline range of 135 months, Your Honor.

4 THE COURT: Mr. De La Cruz, is there anything you
5 would like to say?

6 DEFENDANT DE LA CRUZ: Yes, sir.

7 THE COURT: Before you start --

8 Ms. Irizarry, I am going to deny your request for a
9 minor role, basically, for the reasons stated by the
10 Government; number one, he was entrusted with 1,325 kilos,
11 approximately \$26 million worth of cocaine, and certainly
12 that trust, plus the amount of cocaine involved, does not
13 warrant a minor role reduction.

14 So, Mr. De La Cruz, what is it that you want to
15 say?

16 DEFENDANT DE LA CRUZ: I want to apologize, and I
17 want to ask for forgiveness to the Government of the United
18 States and to Puerto Rico and each one of the citizens
19 present here.

20 You can imagine what my situation is, a young
21 23-year-old whose mother passes away, left in charge of her
22 siblings, having to meet all their needs. And this is the
23 situation I suffered for five years, barely being able to
24 support the family. I was in a very sad and critical state
25 of affairs, financially speaking.

1 As my attorney explained, that whole situation led
2 me to commit this offense of which I am very repentant. I
3 promise that this time that I will be incarcerated, I will
4 try to work in something that will benefit me.

5 In general, what I really want is to find my family
6 well again and to be able to return in time to help them out,
7 because I know they need me during this time.

8 That's all. Thank you very much, sir.

9 THE COURT: On March 26, 2018, Defendant Angel
10 De La Cruz pled guilty to all three counts of the indictment
11 pursuant to a straight plea in Criminal Case No. 17-648,
12 which charges violations of Title 46, United States Code
13 sections 70503 and 70506; Title 21, United States Code
14 section 952; and Title 18, United States Code section 2,
15 conspiracy to possess, possession with intent to distribute,
16 and conspiracy to import approximately 1,325 kilograms of
17 cocaine onboard a vessel subject to the jurisdiction of the
18 United States, and aiding and abetting others to do that; all
19 are class A felonies.

20 The November 1st 2016 Edition of the Sentencing
21 Guidelines Manual has been used to calculate the guideline
22 adjustments pursuant to the provisions of guideline
23 section 1B1.11(a) because the Commission did not promulgate
24 any amendments that would become effective on November 1,
25 2017.

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Counts One through Three were grouped together because the offense level is determined on the basis of the quantity of the substance involved pursuant to guideline section 3D1.2(d).

Based on the provisions of guideline section 2D1.1(c)(1), a base offense level of 38 has been determined because Mr. De La Cruz has been convicted of conspiracy to possess with intent to distribute and importing into the United States at least 450 kilograms of cocaine, a total of 1,325 kilograms.

Because Mr. De La Cruz complied with the provisions of sentencing guideline section 2D1.1(b)(17), the base offense level is reduced by two levels.

Because Mr. De La Cruz timely accepted responsibility for his offenses, however, the offense level is reduced by three more levels pursuant to guideline sections 3E1.1(a) and 3E1.1(b).

There are no other applicable guideline adjustments.

His total offense level is 33.

Because Mr. De La Cruz has no previous convictions, no criminal history points resulted, which places him in Criminal History Category I.

Based on a total offense level of 33 and a Criminal History Category of I, the guideline imprisonment range for

1 Mr. De La Cruz's offenses is from 135 to 168 months.

2 There is a fine range of \$35,000 to \$10 million,
3 plus a supervised release term of at least five years.

4 The probation officer has correctly applied the
5 guideline computations, and the pre-sentence investigation
6 report satisfactorily reflects the components of
7 Mr. De La Cruz's offenses by considering their nature and
8 circumstances.

9 The Court has also considered the other sentencing
10 factors set forth in Title 18, United States Code
11 section 3553(a).

12 Mr. De La Cruz is a 27-year-old Dominican national
13 who has the equivalent of a high school education. He has
14 been a self-employed fisherman all of his life.

15 He has no known history of using controlled
16 substance or of using alcohol to excess, and has no history
17 of mental health issues.

18 The Court will exercise its discretion and impose a
19 variant sentence, taking into consideration factors related
20 to the offense and Mr. De La Cruz. Mr. De La Cruz is an
21 undocumented person with no prior criminal record who is
22 subject to removal proceedings pursuant to the immigration
23 laws.

24 A sentence at the statutory minimum is a sentence
25 which is sufficient but not greater than necessary to reflect

1 the seriousness of the offense, promote respect for the law,
2 provide just punishment -- and provide just punishment for
3 the offense.

4 Accordingly, it's the judgment of the Court that
5 that Angel De La Cruz is committed to the custody of the
6 Bureau of Prisons to be imprisoned for a term of 120 months
7 as to each count of conviction, to be served concurrently
8 with each other.

9 Upon release from confinement, Mr. De La Cruz shall
10 be placed on supervised release for a term of five years as
11 to each count of conviction, to be served concurrently with
12 each other, under the following terms and conditions:

13 He shall observe the standard conditions of
14 supervised release recommended by the United States
15 Sentencing Commission and adopted by this Court.

16 He shall not commit another Federal, State, or
17 local crime.

18 He shall not possess firearms, destructive devices,
19 or other dangerous weapons.

20 He shall not possess controlled substances
21 unlawfully.

22 If deported or granted voluntary departure,
23 Mr. De La Cruz shall remain outside the United States and all
24 places subject to its jurisdiction, unless prior written
25 permission to reenter is obtained from the pertinent legal

1 authorities and he notifies the probation officer of the
2 permission in writing.

3 He shall cooperate in the collection of a DNA
4 sample as directed by the probation officer pursuant to the
5 revised DNA collection requirements and Title 18, United
6 States Code section 3563(a)(9).

7 Having considered Mr. De La Cruz's financial
8 condition, a fine is not imposed.

9 A special monetary assessment in the amount of \$100
10 per count, for a total of \$300, is imposed, however, as
11 required by law.

12 Mr. De La Cruz, you have a right to appeal your
13 conviction and your sentence.

14 A notice of appeal must be filed in this court
15 within 14 days from when the judgment of the Court will be
16 entered.

17 You have a right to apply for leave to appeal
18 *in forma pauperis* if you are unable to pay the cost of an
19 appeal.

20 Because you are represented by court-appointed
21 counsel, she will continue to represent you through any
22 appeal, unless a substitute counsel is later appointed.

23 Is there anything else?

24 MS. IRIZARRY: Yes, Your Honor.

25 We request that he be sent to serve his sentence in

1 a place where he can learn English as a Second Language. He
2 already has a high school degree. So we also request that he
3 be allowed to continue his studies, in particular English as
4 a Second Language.

5 He is also requesting that, if possible, the Court
6 recommend that he be sent to serve his sentence in Fort Dix,
7 or -- he is mentioning Mochannon Valley. I am not sure if
8 the Court is aware of where this is, but I can inform -- I
9 can file a small informative motion when I get back to my
10 office to try to clear up -- he says it's in the State of
11 Georgia. So I will file -- when I get back to the office,
12 I'll file it.

13 Yes, Your Honor. That's our request.

14 And, also, Your Honor, we would like the record to
15 reflect that we understand that the sentence has been
16 substantially and procedurally unreasonable for the reasons
17 we have stated on the record.

18 THE COURT: I will recommend that Mr. De La Cruz be
19 designated either to Fort Dix or that other place in Georgia,
20 where you will inform me; that he take courses in English as
21 a Second Language; and that he participate in any vocational
22 training that may be afforded at the institution in which he
23 may be interested.

24 MS. IRIZARRY: Or degree, since he has his --

25 THE COURT: Pardon?

MS. IRIZARRY: Or any degree, because he has --

THE COURT: Well, if there are college level courses that he may take, then that also.

MS. IRIZARRY: Thank you, Your Honor.

THE COURT: I bet it's more -- there is more of a chance that there will be English as a Second Language courses in Fort Dix than in Georgia, really, but we will find out.

Thank you.

You are excused.

MS. IRIZARRY: Thank you, Your Honor.

MR. HENEK: Thank you, Your Honor.

(PROCEEDINGS ADJOURNED AT 10:50 A.M.)

REPORTER'S CERTIFICATE

I, JOE REYNOSA, Official Court Reporter for the United States District Court for the District of Puerto Rico, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct computer-aided transcript of proceedings had in the within-entitled and numbered cause on the date herein set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

S/Joe Reynosa

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